U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7921020

Date: JUNE 3, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, a sound designer, seeks second preference immigrant classification as a member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner qualified for classification as a member of the professions holding an advanced degree, but that she had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

On appeal, the Petitioner submits a brief asserting that she is eligible for a national interest waiver.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or

> who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
>
> > (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

While neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[2], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign

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[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

The Director found that the Petitioner qualifies as a member of the professions holding an advanced degree. The remaining issue to be determined is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, would be in the national interest.

The regulation at 8 C.F.R. § 204.5(k)(4)(ii) states, in pertinent part, "[t]o apply for the [national interest] exemption the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien." The denial decision stated that the Petitioner did not provide "a properly completed Application for Alien Employment Certification (Form ETA-750B) or Application for Permanent Employment Certification (ETA Form 9089), Parts J, K, and L. Therefore, since the petitioner did not submit this required evidence, USCIS must deny the Form I-140." At the time of filing, however, the Petitioner offered a properly signed and executed Form ETA-750B. Accordingly, the Director's finding on this issue is withdrawn.

Regarding the Petitioner's claim of eligibility under *Dhanasar*'s first prong, she indicated that her proposed endeavor involves working as a sound designer. The Petitioner further explained:

> Sound design is the art of producing sound for theatrical and other productions. Sound designers are responsible for everything the audience hears during a performance. Music and sound effects are essential to the success of a performance, as music and sounds help convey the various emotional, atmospheric, and situational events depicted in a performance, and connect the audience to the production. This applies to theater, film, and television productions. These forms of production are vital to United States culture, as much of our identity as Americans is rooted in and reflected by theater, film, and television.

With respect to her proposed work, the Petitoner asserted that she "is currently working on a play, entitled [redacted]' directed by [redacted]' In addition, the record includes a November 2018 letter from [redacted], a sound designer, stating: "I've recommeded the hiring of [the Petitoner] for two projects: [redacted]' at [redacted] (assistant sound designer) and [redacted] with [redacted] Theater Workshop (substitute front of house engineer)." The Petitioner also provided a July 2018 letter of agreement from [redacted], general manager of [redacted], engaging the Petitoner's services as "assistant sound designer" for the play, entitled '[redacted]"[4] Furthermore, the record contains an October 2018 letter

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[4] As the Petitioner is applying for a waiver of the job offer requirement, it is not necessary for her to have a job offer from a specific employer. However, we will consider information about her prospective positions to illustrate the capacity in which she intends to work in order to determine whether her proposed endeavor meets the requirements of the *Dhanasar* analytical framework.

from [redacted], a musician and sound designer, indicating that the Petitioner "has been observing me on numerous projects over the past year including [redacted] at the [redacted], [redacted] at [redacted] and [redacted] at [redacted], all of which are off-Broadway theatres in [redacted]"[5] Finally, the Petitioner provided a March 2019 letter from [redacted] School of Drama informing her of her acceptance as a student to its Sound Design department for the 2019-2020 academic year.

The record contains information from the U.S. Bureau of Labor Statistics about "Music Directors and Composers" and "Broadcast and Sound Engineering Technicians" discussing their job functions, work environment, education and training requirements, pay, and job outlook. Additionally, the Petitoner provided an article, entitled "What is a sound designer for theatre?" from the Association of Sound Designers. This article explains that a theatre sound designer is responsible for everything the audience hears at a production, including sound effects, music, and acoustics. While this documentation shows the substantial merit of the Petitioner's proposed sound design work, for the reasons discussed below, she has not sufficiently demonstrated the national importance of her proposed endeavor under the first prong of the *Dhanasar* analytical framework.

In determining national importance, the relevant question is not the importance of the profession or industry in which the individual will work; instead we focus on the "the specific endeavor that the foreign national proposes to undertake." *See Dhanasar*, 26 I&N Dec. at 889. In *Dhanasar*, we further noted that "we look for broader implications" of the proposed endeavor and that "[a]n undertaking may have national importance for example, because it has national or even global implications within a particular field." *Id.* We also stated that "[a]n endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area, for instance, may well be understood to have national importance." *Id.* at 890.

To evaluate whether the Petitioner's proposed endeavor satisfies the national importance requirement we look to evidence documenting the "potential prospective impact" of her work. Although the Petitioner's documentation reflects her intention to provide valuable sound design services for various theatrical productions, she has not offered sufficient information and evidence to demonstrate that the prospective impact of her proposed endeavor rises to the level of national importance. In *Dhanasar* we determined that the petitioner's teaching activities did not rise to the level of having national importance because they would not impact his field more broadly. *Id.* at 893. Here, we find the record does not show that the Petitioner's proposed endeavor stands to sufficiently extend beyond her local and off-Broadway productions to impact the field of sound design or the theatre industry more broadly at a level commensurate with national importance.

Furthermore, the Petitioner has not demonstrated that the specific endeavor she proposes to undertake has significant potential to employ U.S. workers or otherwise offers substantial positive economic effects for our nation. Without sufficient information or evidence regarding any projected U.S. economic impact or job creation attributable to her future work, the record does not show that benefits to the U.S. regional or national economy resulting from the Petitioner's projects would reach the level of "substantial

[5] [redacted] indicated that that the Petitioner "reached out to me to ask if she could observe me while I worked on various productions. Although [the Petitioner] did not have a lot of background in theatre, she was keenly interested in learning more about the process and how sound design is an integral part of that experience. . . . [The Petitioner] is a very quick study in terms of learning the equipment necessary to work in sound design, and is progressing well in terms of applying her previous knowledge of music and sound to the task of creating specific work in a theatre environment."

positive economic effects" contemplated by *Dhanasar*. *Id.* at 890. Accordingly, the Petitioner's proposed work does not meet the first prong of the *Dhanasar* framework. Because the documentation in the record does not establish the national importance of her proposed endeavor as required by the first prong of the *Dhanasar* precedent decision, the Petitioner has not demonstrated eligibility for a national interest waiver.

In addition, with respect to the third prong of the *Dhanasar* framework, the Petitioner has not demonstrated that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In denying the petition, the Director concluded that the Petitioner did not meet this prong because the record did "not persuasively establish that the Petitioner has had a substantial impact in the field." In addition, the Director stated that "the opinions of experts in the field" were insufficient to demonstrate that the Petitioner warrants a national interest waiver, but the denial decision did not elaborate on any specific concerns relating to her reference letters. We note that while the Petitioner's sound design contributions and the national interest in these contributions are relevant factors for consideration under prong three of the *Dhanasar* framework, there is no requirement that a petitioner demonstrate "a substantial impact in the field" in order to satisfy this prong. The Director's prong three analysis was also problematic as it did not consider the Petitioner's argument that her "skills cannot be articulated through a labor certification" because of "the uniqueness or her particular talents."

On appeal, the Petitioner maintains that as a "sound designer, a job offer and labor certification would be impractical. [The Petitioner] works on a project to project basis, as her talents are sought after by a variety of producers and artists." Assuming her sound design skills and talents are unique, the benefit these skills and talents stand to offer our country must outweigh the protections afforded to U.S. workers inherent in the labor certification process. *Id.* at 890.

While the record indicates that the Petitioner has shadowed [redacted] and gained additional experience as an assistant sound designer for a few small theatrical productions, she has not demonstrated the extent to which the United States will benefit from her artistic projects. Additionally, the Petitioner has not shown that the national interest in her sound design work is sufficiently urgent to warrant foregoing the labor certification process. Regarding the Petitioner's enrollment in [redacted] School of Drama for the 2019-2020 academic year, the record does not include evidence of the Petitioner's upcoming theatrical projects at [redacted] or other information about the specific sound design work she plans to undertake while attending that university.[6] Nor has she demonstrated that, assuming other qualified U.S. sound designers are available, our country would benefit from her particular projects in the performing arts. After considering the impracticality of labor certification due to her unique skills and her work "on a project to project basis," the evidence relating to the benefit to the United States resulting from her performing arts productions, potential job creation associated with her proposed endeavor, and whether the national interest in her work is sufficiently urgent to warrant foregoing the labor certification process, the Petitioner not established that she offers contributions of such value that, on balance, they would benefit the United States at a level sufficient to warrant a waiver of the requirements of a job offer and thus of a labor certification.

[6] In *Dhanasar*, we held that a petitioner must identify "the specific endeavor that the foreign national proposes to undertake." *Id.* at 889.

III. CONCLUSION

As the Petitioner has not met the requisite first and third prongs of the *Dhanasar* analytical framework, we find that she has not established she is eligible for or otherwise merits a national interest waiver as a matter of discretion. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.